

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WESLEY BROWN,

Defendant-Appellant.

UNPUBLISHED

January 3, 2003

No. 227953

Midland Circuit Court

LC No. 99-009315-FC

Before: Neff, P.J., and Hoekstra and O’Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct (“CSC”), MCL 750.520b(1)(b), and one count of second-degree CSC, MCL 750.520c(1)(b). He was sentenced to concurrent prison terms of ten-and-one-half to twenty-five years each for the first-degree CSC convictions, and seven-and-one-half to fifteen years for the second-degree CSC conviction. He appeals as of right. We affirm defendant’s convictions but vacate his sentences and remand for a hearing on the scoring of offense variable (OV) 7.

This case arises out of defendant’s sexual assaults against his then-fourteen-year-old daughter. Defendant argues that the prosecutor committed numerous instances of misconduct that deprived him of a fair trial. We disagree. Claims of prosecutorial misconduct are reviewed on a case-by-case basis and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267, ns 5-7; 531 NW2d 659 (1995).

Apart from defendant’s claim concerning the prosecutor’s remark about the inadmissibility of hearsay evidence, none of the alleged claims of misconduct were preserved with an appropriate objection at trial. These unpreserved issues are forfeited unless defendant can show a plain error (i.e., one that is clear or obvious) affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also *People v Grant*, 445 Mich 535, 548-549, 552-553; 520 NW2d 123 (1994).

The prosecutor did not commit plain error in introducing evidence of defendant’s propensity for violence. This evidence was *material* (i.e., related to a fact at issue, “in the sense that it was within the range of litigated matters in controversy”), and also had *probative* force (i.e., a tendency to make the existence of a fact of consequence more or less probable than it

would be without the evidence). See *People v Sabin (After Remand)*, 463 Mich 43, 56-57, 60; 614 NW2d 888 (2000). In particular, defendant's violent temper was relevant to explaining the victim's delay in reporting the alleged sexual abuse. See *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995). Additionally, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. *Sabin, supra* at 55-56. Furthermore, any error stemming from the prosecutor's failure to give advance notice of this evidence, as required by MRE 404(b)(2), did not affect defendant's substantial rights, inasmuch as it is apparent that defendant was aware of the evidence before trial and there is no indication in the record that defendant was either surprised or unprepared to meet it. Lastly, the prosecutor's remarks during closing argument constituted permissible commentary on this evidence and the reasonable inferences arising therefrom. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

The prosecutor did not improperly vouch for the credibility of any witnesses. See *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). Rather, through the challenged remarks, the prosecutor was responding to defense counsel's arguments concerning the expertise and credibility of the witnesses. See *Howard, supra* at 548. Considered in this context, there was no plain error.

The prosecutor did not disparage the defense. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Rather, he was responding to defense counsel's arguments concerning why the prosecutor had not called the lead detective to testify. *Id.* at 592-593. Further, the prosecutor made permissible comments on the evidence and addressed defendant's arguments concerning alleged inconsistencies in the testimony. *Howard, supra* at 548; see also *Watson, supra* at 592-593. While the prosecutor did not acknowledge that there are permissible uses of hearsay and exceptions to the hearsay rule, his comments concerning the detective's lack of personal knowledge were accurate. See MRE 802. Additionally, the trial court instructed the jury concerning the proper use of prior inconsistent statements and what is (and is not) evidence. Thus, the prosecutor's comments concerning hearsay did not amount to misconduct that deprived defendant of a fair trial. The prosecutor's remaining comments did not amount to plain error.

The prosecutor's comment that this sort of sexual abuse "happens all too often" did not amount to an impermissible "appeal to the fears and prejudices of jurors" *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998). Further, even if somewhat improper, the comment was brief and isolated and, in light of the record as a whole, was not reasonably likely to affect the outcome. Thus, the comment did not amount to plain error affecting defendant's substantial rights.

In eliciting the fact that defendant's fiancée was previously married to defendant's ex-wife's brother, the prosecutor was attempting to place the victim's relationship with defendant's fiancée in context. Although the relevance of this information was fairly low, its potential for unfair prejudice was also low. Thus, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403. Further, the prosecutor did not dwell on that relationship in an attempt to portray defendant in a bad light. In light of the record as a whole, there was no plain error affecting defendant's substantial rights.

Next, defendant argues that trial counsel was constitutionally ineffective. Where a defendant's request for a *Ginther*¹ hearing is denied, review of an ineffective assistance of counsel claim is limited to mistakes apparent on the record. See *People v Bigelow*, 225 Mich App 806, 810; 571 NW2d 520 (1997), as reinstated in *People v Bigelow*, 229 Mich App 218, 221; 581 NW2d 744 (1998).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he has been prejudiced by the error in question. *Id.* at 312, 314. That is, defendant must show that the error might have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *Pickens*, *supra* at 330. Every effort must be made to eliminate the distorting effects of hindsight. *Id.*; see also *People v Stanaway*, 446 Mich 643, 688; 521 NW2d 557 (1994).

Even if the victim's prior consistent statements could have been excluded because they were made after the motive to fabricate arose, MRE 801(d)(1)(B); *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996); see also *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001), the record shows that defense counsel made a strategic decision not to object to the statements (and to open the door to other consistent statements not involving the charged acts), because he wanted to be able to impeach the victim with the few inconsistent statements that were available, to wit: whether defendant remained silent or told the victim that the three-wheeler was broken, and whether the victim stated (contrary to her trial testimony) that defendant had never done anything like that before. Considering that the victim's credibility was the principal issue at trial, defendant has failed to overcome the presumption that counsel's decision not to object was sound trial strategy under the circumstances.

Whether and how to impeach a witness is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). In order to overcome the presumption of sound trial strategy, a defendant must show that counsel's alleged impeachment error may have made a difference in the outcome by, for example, depriving the defendant of a substantial defense. *Id.* at 737; see also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Here, defendant made a strategic decision concerning how to cross-examine the Protective Services investigator. The fact that his strategy was not successful and resulted in her testifying that defendant had declined to be interviewed on the advice of counsel does not show that counsel was ineffective. Further, in light of the record as a whole and the court's instruction regarding defendant's right to remain silent, there is no reasonable probability that this alleged error affected the outcome.

¹ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

The decision whether to present an alibi witness is likewise presumed to be a matter of trial strategy, for which this Court will not substitute its judgment. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this case, the date of the charged sexual acts was uncertain. Given this circumstance, defendant's alleged alibi witness would not have provided a substantial defense. *Flowers, supra* at 737. Defendant has failed to overcome the presumption of sound trial strategy or shown that counsel's failure to present this alleged alibi witness affected the outcome.

Similarly, the decision whether to present the victim's counselor in order to impeach the victim was a matter of trial strategy. *Davis, supra* at 368. The proposed impeachment evidence was not substantially different from other evidence presented at trial. Indeed, there are indications in the record, including the attachments to defendant's sentencing memorandum, that the counselor was defendant's friend, that defense counsel did not find her to be credible, and that she did not have knowledge of any inconsistencies or recantations, only her personal opinion that the victim may be fabricating the allegations of abuse. Defendant has failed to overcome the presumption of sound trial strategy or shown that there is a reasonable probability that counsel's failure to call this witness deprived him of a substantial defense or otherwise affected the outcome. *Flowers, supra* at 737.

Contrary to defendant's argument, the psychologist's testimony – that eighty percent of abused children are abused by a relative – was admissible to explain a typical child victim's delay in reporting a sexual assault by a relative. See *Peterson, supra* at 352-353. Moreover, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Because an objection would have been futile, counsel was not ineffective for failing to object. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

In order to impeach the victim with a prior inconsistent statement, i.e., that defendant had never done anything like this before, counsel asked the Protective Services investigator to read part of a sentence to the jury. Counsel thereby exposed himself to attack by the prosecutor, who had the witness read the rest of the sentence. However, this was a strategic decision by counsel and, considering that the victim's credibility was the principal issue in the case, defendant has failed to overcome the presumption that this was sound trial strategy under the circumstances. Further, in light of the record as a whole, there is not reasonable probability that this alleged error affected the outcome.

It is undisputed that the victim did not testify regarding the appearance of defendant's penis, including any distinguishing characteristics that it may have had. Although the victim testified at defendant's preliminary examination that she had a good look at his penis and that it had no identifying marks or scars that she could remember, she also said that she was not sure if she would have noticed them. Questioning the fifteen-year-old victim about this sensitive matter might have alienated the jury, and the victim's inexperience, fear, and humiliation could have been used to explain why she might not have noticed any distinguishing features that may have existed. Under the circumstances, defendant has failed to overcome the presumption that avoidance of this line of questioning was sound trial strategy. *Flowers, supra* at 737.

Next, we disagree with defendant's position that the decision to close the Protective Services file was intended as an assertion and, therefore, subject to exclusion under the hearsay rule. MRE 801(a); see also *People v Jones (On Rehearing After Remand)*, 228 Mich App 191,

204; 579 NW2d 82 (1998), modified in part 458 Mich 862 (1998). The investigator's opinion that the victim was no longer at risk was offered to explain why the file was closed in this particular case. There may be a myriad of reasons why a file might be closed in other cases, including lack of evidence. Therefore, the explanation in this case was not a statement and a hearsay objection would have been futile. *Kulpinski, supra* at 27. Accordingly, counsel was not ineffective in this regard.

Next, consistent with our conclusion that defendant's claims of prosecutorial misconduct have no merit, we conclude that counsel was not ineffective for failing to object to those matters. *Id.*

Nor was counsel ineffective for failing to object to the court's reasonable doubt instruction on the basis that it lacked "moral certainty" language, or the "hesitate in making an important decision" language from former CJI 3:1:04. See *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); CJI2d 3.2, commentary, p 3-7. The court instructed the jury on reasonable doubt in accordance with CJI2d 3.2, which this Court has repeatedly held adequately presents the concept of reasonable doubt. *Hubbard, supra* at 487; *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999).

Defendant also argues that his original appellate attorney was ineffective. We disagree. The same standard applicable to trial counsel applies when analyzing claims of ineffective assistance of appellate counsel. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993), *aff'd* 449 Mich 375, 390-391; 535 NW2d 496 (1995); see also *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Although defendant's original appellate attorney committed a serious error by failing to raise the issue of the scoring of OV 7, defendant was not prejudiced by that error because the issue has been raised by defendant's current appellate attorney. As previously discussed, defendant's other claims of ineffective assistance of trial counsel have no merit and, therefore, defendant's original appellate attorney was not ineffective for failing to raise them. Similarly, no harm resulted from appellate counsel's alleged failure to advise substitute counsel that this case was about to be dismissed for failure to file a brief. Therefore, defendant's original appellate attorney was not ineffective in this regard.

Defendant also argues that the cumulative effect of multiple errors deprived him of a fair trial. We disagree. Defendant has failed to show any errors, considered singularly or in combination, affecting the validity of his convictions. Therefore, there was no cumulative effect. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Lastly, defendant argues that the trial court erred in its scoring of OV 7 of the sentencing guidelines and trial counsel was ineffective in failing to object to the scoring. In response, the prosecution does not concede that defendant received ineffective assistance of counsel, but nevertheless states ". . . the [p]eople do not object to a remand for a sentencing hearing on the issue of scoring OV 7." The scoring of 50 points for OV 7 obviously affected the sentence range in this case and unlike our dissenting colleague, we think it prudent to have the trial court address for the first time the basis for scoring OV 7 rather than this Court. Consequently, we accept the prosecutor's invitation to remand for a hearing at which the trial court is directed to address whether defendant was properly assessed 50 points under OV 7. If the trial court should

determine that the scoring of that factor was improper, it shall vacate the original sentence and proceed to resentence defendant under the corrected guidelines.

Defendant's convictions are affirmed, but this case is remanded for a hearing on the scoring of OV 7. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Joel P. Hoekstra